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FEDERATION REPORTS.

CHENG SENG HENG & 4 OTHERS v. PUBLIC PROSECUTOR.*

[App. Crim. Juris. (Willan, C.J., Spenser-Wilkinson and Russell, JJ.) November 4, 1948]

[F.M. — Criminal Appeal No. 119 of 1948]

Emergency Regulations Rules 4, 5 and 33 — Statement to Police Officer — Statement elicited by cross-examination — Evidence Ordinance Ss. 24 and 29.

In this case the first appellant was convicted of possession of ammunition and the other four appellants were convicted upon a charge of consorting with a person who was carrying arms. The appeal of the first appellant was dismissed, as the Court found there was no misdirection by the learned trial Judge. The appeals of the other four appellants were based mainly on the fact that the statements made by them to the Police under S. 33 of the Emergency Regulations 1948 were recorded through the interpretation of a detective who himself took part in the raid. It also appeared that the statements were elicited by questions in the nature of cross examination. In dealing with the four appellants on the charge of consorting, the learned trial Judge did not take the opinions of the assessors but convicted them himself.

Held, (1) that under S. 33 of the Emergency Regulations the Police have no right to elicit statements from accused persons by means of cross-examination or anything in the nature of cross-examination; (2) that as the statements in this case were elicited by means of questions in the nature of cross examination, they were inadmissible in evidence; (3) that the learned trial Judge should have directed the assessors that as the interpreter used was himself interested in the case little reliance could be placed upon even those parts of the statements which were admissible; (4) that the learned trial Judge was wrong in not taking the opinions of the assessors upon the charge of consorting and in convicting the four appellants upon this charge himself and therefore the purported conviction by the learned Judge of the appellants on this charge cannot stand.

Semble: A charge of consorting should not as a general rule be joined with the capital charge of carrying or possession of arms or ammunition as the evidence admissible upon a charge of consorting is much wider in range than that which is admissible on the simpler issue of carrying or possession of an arm or ammunition and the effect of joining a charge in respect of this lesser offence is likely to have the effect of prejudicing the minds of the assessors in regard to the capital charge.

Cases referred to:—

(1) *Cheong See Leong v. Public Prosecutor* (1949) M.L.J. 67.

(2) *Ibrahim v. Rex* (1914) A.C. 599.

* The law has since been amended. See amendment to Emergency Regulations, Regulation 33 and **Poon Heong v. Public Prosecutor** (1949) M.L.J. 114.

(3) *King v. Best* (1907) 1 K.B. 692.
(4) *Rex v. Gardner and Hancox* (1916) 86 L.J. K.B. 206.
(5) *Rex v. Alfred Brown* 23 C.A.R. 56.
(6) *Rex v. Winkle* 76 J.P. 191; Digest Vol. 14 p. 416.
(7) *Rex v. Treacy* 1944 2 A.E.R. 229.
(8) *Rex v. Lim Ah Seng* (1931) S.S.L.R. 178; (1932) M.L.J. 12.
(9) *Rex v. Santokh Singh* (1931) S.S.L.R. 147; (1933) M.L.J. 178.
(10) *Mohamed Isa bin Leman v. Public Prosecutor* (1938) F.M.S.L.R. 72; (1939) M.L.J. 160.
(11) *Goh Ah Yew v. Public Prosecutor* (1949) M.L.J. 63.

CRIMINAL APPEAL.

R. P. S. Rajasooria for the Appellant.

A. M. I. Austin (D. P. P.) for the Respondent.

The judgment of the Court of Appeal was delivered by :—

Spenser-Wilkinson, J : — All the appellants in this case were originally charged first with possession of a Japanese automatic pistol; secondly with possession of certain ammunition; and alternatively with consorting with a person who was carrying arms. The charges were subsequently amended during the course of the trial and, after the amendment, the 1st appellant stood charged with possession of six rounds of ammunition and alternatively with consorting with a person who was carrying arms and the other appellants stood charged with consorting only. The 1st appellant was convicted upon the charge of possession of six rounds of ammunition and the other four appellants were convicted upon the charge of consorting.

The facts, so far as they are relevant to this appeal, were that a combined police and military party, whilst on a routine patrol, started to cordon off some of the houses at a place called Kampong Lengkuas when four Chinese (of whom 1st, 2nd and 3rd appellants were three) ran out of one of these houses. They were challenged and, failing to stop, were fired upon, with the result that one man, Kok Sin was shot dead and the others surrendered. The Chinese were all searched and on the person of the dead man was found a Japanese automatic pistol and a hand-grenade, and in the pocket of the 1st appellant were found 6 rounds of ammunition wrapped in a handkerchief. The 4th appellant surrendered inside the house and the 5th appellant was arrested some 50 yards away in a padi-field. Nothing incriminating was found upon the persons of appellants Nos. 2, 3, 4 and 5.

The 1st appellant appealed against his conviction in respect of possession of the ammunition on the grounds that there was no satisfactory corroboration of the evidence of the police constable who searched him, and that the appellant's explanation as to the manner in which he might have come into possession of these rounds was a reasonable one.

In our view, these grounds of appeal must fail. The evidence of Police Constable No. 3560 was that he searched the 1st appellant and found 6 rounds of pistol ammunition in his left trousers pocket inside a handkerchief. The ammunition and handkerchief were produced in Court and identified by the police constable. This evidence was corroborated in every particular by the first prosecution witness, Neubronner, who stated that the handkerchief and 6 rounds of ammunition were handed over by the police constable to him. Another witness also gave evidence as to the finding of this ammunition upon the 1st appellant although he could not remember whether the rounds were in a handkerchief or not. There was thus ample evidence, if these witnesses were believed, upon which the Assessors and the learned trial Judge could find the 1st appellant guilty, as they did, and there was no misdirection by the learned trial Judge in his summing up. The 1st appellant's explanation was in effect that whilst he was being searched he was assaulted by the Police and rendered semi-unconscious and it was suggested that in his semi-conscious state these bullets were planted upon him by the police. This explanation was put very fairly to the Assessors by the learned trial Judge and the Asssessors were, in our opinion, entitled, as they did, to reject it.

The appeals of 2nd, 3rd, 4th and 5th appellants were based mainly upon the fact that the statements made by made by them to the police under Regulation 33 of the Emergency Regulations, 1948 which were admitted in evidence, should be given no weight because the detective, who was used as an interpreter in the giving of their statements, had himself taken part in the raid and, therefore, was interested. Counsel for the appellants relied upon the decision of this Court in *Cheong See Leong v. Public Prosecutor*[1] in which in somewhat similar circumstances this Court held that no reliance could be placed on the accuracy of a statement taken through an interested interpreter. This contention, however, is of less importance in this appeal

than at first sight appears because, in our view, the most important parts of the statements made to the police by the appellants in this case were inadmissible for another reason, namely, that they were elicited from the appellants by means of cross-examination by the police whilst the appellants were in their custody.

The admissibility of statements made by accused persons to the police in cases of this kind is covered by Regulation 33 of the Emergency Regulations, 1948 which reads as follows :—

> 33(1). Where any person is charged with any offence against these Regulations or with any offence specified in the Schedule to these Regulations, any statement, whether such statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after such person is charged and whether in the course of a police investigation or not, by such person to or in the hearing of any police officer of or above the rank of Inspector shall, notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and, if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:
>
> Provided that no such statement shall be admissible or used as aforesaid —
>
> (a) if the making of the statement appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a person in authority and sufficient in the opinion of the Court to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or
>
> (b) in the case of a statement made by such person after his arrest, unless the Court is satisfied that, before making such statement, a caution was administered to him in the following words or words to the like effect: "It is my duty to warn you that you are not obliged to say anything, but anything you say may be given in evidence at your trial".
>
> (2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which paragraph (1) of this Regulation applies shall not be bound to answer any questions relating to such case after any such caution as aforesaid has been administered to him.
>
> (3) This Regulation shall apply in relation to any person tried after the commencement of these Regulations whether or not the proceedings against such person were instituted and whether or not the relevant statements were made, before such commencement.

The form of caution laid down by paragraph (b) of the proviso, though not identical in wording is substantially the same as that laid down in England, where it is as follows :—

> Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, and whatever you say will be taken down in writing and will be given in evidence;

and the provisions of paragraph (a) of the proviso are almost word for word the same as section 24 of the Evidence Enactment which substantially reproduces the English law on the subject of statements made voluntarily. So that in considering the meaning of the proviso as a whole we must consider primarily the English authorities on the subject.

In 1914 it was stated by the Privy Council that the English law in regard to the admissibility of statements obtained as a result of questions put to an accused person whilst in custody was not then settled (*Ibrahim v. Rex*[2]). Since then, however, the law has become clearer and is now embodied in Rule 7 of a Memorandum by His Majesty's Judges, commonly known as "the Judges' Rules". Rule 7 reads as follows (see *Archbold's* 31st Edition page 372: *Stone's* Justices' Manual 79th Edition page 292) :—

> A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was *morning or evening*, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

In a note in the 79th Edition of *Stone's* Justices' Manual page 291, note (q), it is stated that the memorandum so far as it has been approved by the Court of Criminal Appeal in the cases mentioned in note (u) on page 292 has legal effect. Note (u) reads as follows :—

> The police have no right to interrogate arrested persons, nor to invite from one co-defendant a statement against another and a conviction obtained by such improper means will not be upheld without other evidence which must inevitably have resulted in a conviction. (R. v. Grayson, 16 Cr. App. R. 7; R. v. Pilley, Id. 138; 86 J.P. 190; R. v. Reid, 16 Cr. App. R. 161; R. v. Taylor, post, p. 1317; R. v. Treacy, p. 264, ante.).

The case of *King v. Best*[3] is authority for the proposition that the mere fact that a statement has been made in answer to a question does not make the answer to such a question inadmissible. But that was a case of a single question being asked and it was not a question in the nature of cross-examination. In *Rex v. Gardner and Hancox*[4] however, Avory, J. said :—

> The police have been told over and over again from the bench that they have no right to cross-examine a prisoner after he has been arrested and charged.

We would refer also, though the facts are somewhat different from those in the appeal before us, to *Rex v. Alfred Brown*[5] where, approving the decision in *Rex v. Winkle*[6] it was held that the police have no right to suggest by questions to a person detained in custody that they have evidence of his guilt and the

answers to such a suggestion are not admissible in evidence.

The most recent decision on this subject is that of the Court of Criminal Appeal in *Rex v. Treacy*[7]. In the judgment of the Court in that case the following passages appear :—

> The fact was that the accused was detained upon the charge of murder and whoever was the senior officer in that police station ought to have seen that, being under arrest upon a charge of murder, no question was put to that man about that murder, more particularly in view of the state in which he was for he was unable to talk although he could write.
>
> What was done was that he was cross-examined by the second police officer who wrote questions to which the accused wrote answers and we have before us.....the questions written by the officer and answers written by the appellant.....
>
> The Magistrates, as we think, well advised, came to the conclusion that, seeing that the man was at the time when that cross-examination was administered to him in custody on a charge of murder, they ought not to admit that statement, and they refused to allow it to go in.

As stated above, in view of the similarity of the provisions of Regulation 33 to the provisions of the English law it is proper that we should look mainly to the English cases for guidance. But a similar result is obtained by a consideration of local authorities. There have been three decisions of the Courts of Appeal in this country on the subject of confessions to Magistrates given in answer to questions. In *Rex v. Lim Ah Seng*[8] it was held that a statement or confession is not made voluntarily unless it is volunteered, and that the only questions which might lawfully be put were those which tended merely to assist the prisoner by making his meaning clearer. In *Rex v. Santokh Singh*[9] a subsequent Court of Appeal considered that the decision in *Rex v. Lim Ah Seng* went too far but they agreed with that decision in so far as it held that questions asked by way of cross-examination were inadmissible. Finally in *Mohamed Isa bin Leman v. Public Prosecutor*[10] the F.M.S. Court of Appeal followed the decision in *Rex v. Santokh Singh* and by implication held that questions in the nature of cross-examination would be improper.

Since this is the position in regard to a Magistrate who is a judicial officer and is more likely to know the difference between cross-examination and questions intended to elucidate ambiguity, it seems to us that these principles must apply with greater force to a police officer, particularly as an accused person is in the physical custody of the police whereas he would never regard himself as in the custody of a Magistrate. It is to be observed, moreover, that confessions made to a Magistrate under section 115 of the Criminal Procedure Code are affected by section 29 of the Evidence Enactment whereas the latter section has no application to statements which it is sought to admit under regulation 33 of the Emergency Regulations.

On the principles enunciated in the above-quoted authorities we hold that under section 33 of the Emergency Regulations the police have no right to elicit statements from accused persons by means of cross-examintion or anything in the nature of cross-examination. The only safe rule to be followed when statements are being taken from accused persons by the police under Regulation 33 is Rule 7 of the Judges' Rules set out above and any departure from this rule will render the statements inadmissible in evidence. Applying these principles to the statements of the appellants in this case it appears that in the case of appellants 1, 2 and 3, the first part of the statements were made voluntarily, but the police, in each case, went on to ask questions in the nature of cross-examination. In our view the answers to these questions should not have been tendered or admitted in evidence. With regard to the statements of appellants Nos. 4 and 5 the position is worse. In each of these cases the appellant after being cautioned replied that he preferred to say nothing; yet in spite of this the police went on to ask questions and to record answers which cover approximately a foolscap page of typewriting. Indeed in the case of appellant No. 5 that part of the statement, which consists of questions and answers, is headed "cross-examination." Accordingly the whole of both these statements was inadmissible.

Even the value of the first part of the statements made by the first three appellants is in doubt by reason of the fact that an interpreter was used who was himself interested in the case because he had taken part in the particular raid. We need not repeat here what was said by this Court in *Cheong See Leong v. Public Prosecutor*[1]. It is sufficient for us to say that we think a proper direction by the learned trial Judge would have been that in view of the interest of the interpreter little reliance could be placed upon the statements.

The improper admission of these statements would no doubt be a sufficient ground alone upon which to hold that the conviction of these four appellants upon the charge of consorting could not stand. There was, however, another grave defect in the trial of appellants Nos. 2 to 5. All five appellants were jointly charged at the one trial upon the charges as set out in the first paragraph of this judgment. The learned Judge, however, did not take the opinions of the Assessors

upon the charge of consorting but convicted appellants 2, 3, 4 and 5 upon this charge himself. For the reasons which have already been fully set out in the judgment of this Court in *Goh Ah Yew v. Public Prosecutor*[11] which immediately preceded this appeal, we find that this was an illegality and the purported conviction by the learned Judge of the appellants on this charge cannot stand.

Had this last defect in the proceedings stood alone we would have considered the question whether a retrial should be ordered, but in view of the fact that the prosecution put in and relied upon the inadmissible statements of the appellants to the police it appears to us that without these statements it was thought that there would be insufficient evidence upon which to convict and we are of opinion that this is not a case in which a retrial should be granted.

In view of our decision that the conviction in respect of the charges of consorting cannot stand it is not strictly necessary for us to deal with the further question whether a charge of consorting is one which should be joined with the capital charge under Regulation 4(1) of the Emergency Regulations, 1948. We think it right, however, to indicate our view that the evidence admissible upon a charge of consorting is so much wider in range than that which would be admissible on the simpler issue of carrying or possession of an arm or ammunition that the effect of joining a charge in respect of this lesser offence is likely to have the effect of prejudicing the minds of the Assessors in regard to the capital charge. We are of opinion, therefore, that a charge of consorting should not as a general rule be joined with a capital charge.

The convictions of appellants 2, 3, 4 and 5 are quashed. The conviction of appellant No. 1 upon the charge of possession of ammunition is upheld and the sentence confirmed.

Appeal of first appellant dismissed; appeal of second, third, fourth and fifth appellants allowed.

MOK CHOON v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Laville and Spenser-Wilkinson, JJ.) June 2, 1949]

[F.M. — Criminal Appeal No. 56 of 1949]

Emergency Regulations, Regulation 4(1)(b) — Statement of accused to Police Officer — Accused questioned on subject of crime for which he was taken into custody — Admissibility of statement.

The appellant in this case was charged with and convicted of being in possession of 6 rounds of 12 bore shot-gun ammunition, an offence contrary to Regulation 4(1)(b) of the Emergency Regulations, 1948. The only evidence against the appellant was a statement made by him to an Inspector of Police. It appeared that the statement was made by the appellant in answer to a question whether he admitted being in possession of the ammunition.

Held, (1) that the appellant, who was under arrest upon a charge of being in possession of ammunition, should not have been questioned about the charge; (2) that the statement was wrongly admitted in evidence and the conviction must be quashed.

Cases referred to:—

(1) *Cheng Seng Heng & 4 Others v. Public Prosecutor* (1949) M.L.J. 175.

(2) *Rex v. Treacy* (1944) 2 A.E.R. 229.

CRIMINAL APPEAL.

T. T. Bok for the Appellant.

F. C. Cooke for the Respondent.

Willan, C. J.: — In this case the appellant was charged with being in possession of 6 rounds of 12 bore shot-gun ammunition, an offence contrary to Regulation 4(1)(b) of the Emergency Regulations 1948.

Shortly, the facts are that in the early morning of the 28th December, 1948, at about 3 a.m., a combined party of police and military went to a squatter's hut situated about 40 yards from the edge of an old mining pool. In the party was an Inspector of Police, Mohamed Pilus, who entered and searched that hut. Whilst doing so he heard noises of persons scrambling about from the direction of the pool. He shouted to them to stop and shots came from that direction. The combined party of police and military having returned the fire until all firing had ceased, called upon the unknown, and as yet unseen, persons to surrender. One Chinese did so and, on Inspector Mohamed Pilus examining the spot from which this Chinese had come, he found a tarpaulin spread on the ground on which there was clothing and equipment, and also 6 rounds of 12 bore shot-gun ammunition.

A cordon was thrown round the mining pool and at day-break a search made. Three persons were found hiding in the pool, including the appellant. The appellant was arrested. On the 31st of December 1948, after he had been under arrest from the 28th of December 1948, he was brought before Inspector Mohamed Pilus who, through a Chinese Interpreter, told the appellant that he was charged with being in possession of 6 rounds of 12 bore shot-gun ammunition. After informing the appellant of the charge the Inspector cautioned him in a statutory form of the